IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-446

WILLIAM T. DUNHAM and
MARY LOU DUNHAM,
husband and wife,

Appellants,

v.

CLACKAMAS COUNTY, a
political subdivision
of the State of Oregon,

Appellee.

On Appeal from the
SUPREME COURT OF THE STATE OF OREGON

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment of the Supreme Court of the State of Oregon, affirming the decision of the trial court and denying a rehearing in this matter, entered in this action on June 21, 1978.

The Mandate of The Supreme Court of the State of Oregon issued in this proceeding on June 27, 1978. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of the State of Oregon is reported at 282 Or. 419, 579 P.2d 229 (1978). The opinion of the Court of Appeals of the State of Oregon is reported at 30 Or.App. 595, 567 P.2d 605 (1977). The Memorandum Opinion of the Circuit Court of the State of Oregon for the County of Clackamas is unreported. A copy of the Memorandum Opinion of the Circuit Court is attached hereto in Appendix A.

JURISDICTION

This proceeding is a civil action by Clackamas County to enforce §§ 3.2 and 22.3 of the Clackamas County Zoning Ordinance and was brought pursuant to Oregon Revised Statutes 215.185.

The final judgment of the Supreme Court of the State of Oregon was entered on May 23, 1978. A timely petition for rehearing was denied on June 21, 1978. The Mandate of the Supreme Court of the State of Oregon was issued on June 27, 1978. The Notice of Appeal was filed on June 28, 1978, in the Supreme Court of the State of Oregon. A copy of the Notice of Appeal was filed in the

Circuit Court of the State of Oregon for the County of Clackamas on July 3, 1978. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C., § 1257(2).

QUESTIONS PRESENTED

1. Whether §§ 3.2 and 22.3 of the Clackamas County Zoning Ordinance, as applied to Appellants, impinge upon their fundamental right to acquire, enjoy, own and dispose of property under the Fourteenth Amendment to the United States Constitution.

2. Whether §§ 3.2 and 22.3 of the Clackamas County Zoning Ordinance, as appied to Appellants, violate Appellants' right to the equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

3. Whether the Fourteenth Amendment protects against the arbitrary and discriminatory classification of property, as well as the arbitrary and discriminatory classification of persons.

4. Whether the strict scrutiny test must be applied to the Clackamas County Zoning Ordinance because it impinges upon the exercise of a fundamental right.

5. Whether the classification of property established by the Clackamas County Zoning Ordinance bears a rational relationship to a permissible state objective.

6. Whether Appellants' sectional home is

a "trailer house," as defined by Clackamas County Zoning Ordinance § 3.2.

STATUTES INVOLVED

Clackamas County Zoning Ordinance § 3.2 DEFINITIONS:

TRAILER HOUSES. Buildings designed in such a manner that they may be moved from one location to another.

§§ 7.41(a), (b), (c), and 22.3(a) and (b), and Oregon Revised Statutes, Chapter 215.180 (1975) (Repealed by 1977 Oregon Laws, Chapter 766, § 16), Oregon Revised Statutes, Chapter 215.185 (1975) (Amended by 1977 Oregon Laws, Chapter 766, § 6), are set forth in Appendix "B" hereto.

STATEMENT

Appellants, William and Mary Lou Dunham, belong, economically, to that forgotten segment of American society known as the "Middle Class." In 1972, after months of frustration in the search for shelter, they purchased six acres of land in rural Clackamas County, Oregon. Rather than become renters, they purchased a two-section mobile home at the modest cost of $14,000.00. Mary Lou Dunham stated that the reason for purchasing the mobile home was, "It was the only way we could better our future." (See Appendix "C")

The Dunhams' home contains 1500 square feet of usable living space. It consists of three bedrooms, two bathrooms, a kitchen, utility room, dining room, living room and family room. The Dunhams have installed improvements, such as a patio, fences, porch, circular driveway and landscaping.

The Dunham home consists of two 12' x 68' sections, delivered to their six acres. The sections were placed on a concrete foundation, assembled and bolted together to form the dwelling. The tongues, axles, wheels and springs were removed from the home with a cutting torch prior to final installation. The home is anchored to its foundation. Approved utilities are connected to and serve the home, including approved sewage and water systems. Appellee, Clackamas County, classifies the Dunham home as a "trailer house" in its Zoning Ordinance. The Clackamas County Assessor assesses and taxes the mobile home as real property. The Dunhams pay the same tax rate (millage) as their neighbors.

Comment on the aesthetic characteristics of the Dunham home was made by the majority opinion in the Oregon Court of Appeals and the majority opinion in the Oregon Supreme Court. The Oregon Court of Appeals stated:

"The structure has the appearances of a conventionally constructed home." (See Appendix "A")

The majority opinion of the Oregon Supreme Court made the following statement: "The majority opinion below states, 'The structure has the appearances of a conventionally constructed home.' 30 Or. App. at 598. After viewing the photograph--exhibits, we must disagree with this characterization." (See Appendix "A")

No one will ever know to what extent the aesthetic disagreement regarding the Dunhams' home played in the reversal of the Oregon Court of Appeals' decision. No aesthetic standard exists, or ever existed, in either applicable building codes or the Clackamas County Zoning Ordinance, for any type of structure, including the Dunham home. The Dunhams' neighbors had no objections to the aesthetic qualities of the home, as evidenced by their testimony at trial.

On May 17, 1960, Clackamas County enacted the Clackamas County Zoning Ordinance. On December 14, 1967, Appellee extended the Clackamas County Zoning Ordinance to apply to the six acres of real property owned by Appellants. Appellants' property was, thereby, zoned a Recreational Residential District. Individual mobile homes

were prohibited in this district while mobile home parks with an allowable maximum density of four homes per acre were permitted as a conditional use. (See Appendix "B")

On April 4, 1975, Appellee brought a suit to abate Appellants' home as a nuisance pursuant to Oregon Revised Statute 215.185 (Amended by 1977 Oregon Laws, Chapter 766 § 6). (See Appendix "B")

Appellants' Answer alleged that Appellants' home was not a "trailer house" under the Clackamas County zoning ordinance definition and that the classification of their home as a "trailer house", as distinguished from other site-built and prefabricated housing, created a classification which impinged upon the exercise of their fundamental right to acquire, enjoy, own and dispose of real property.

Trial was had on the merits. The trial court's Memorandum Opinion rendered June 3, 1976, held Appellants' home to be a mobile home or "trailer house" within the definition of the Clackamas County zoning ordinance. The Memorandum Opinion of the trial court further stated that the Clackamas County zoning ordinance did not establish a "policy of exclusion" which violated Appellants' constitutional rights and that the

application of the Zoning Ordinance to Appellants was not arbitrary, unreasonable, capricious, confiscatory or oppressive so as to violate Appellants' constitutional rights. (See Appendix "A")

The trial court's decree was entered on July 27, 1976. (See Appendix "A")

Appellants timely filed their Notice of Appeal and Designation of Record on August 23, 1976. Appellants' Assignment of Error No. 3 raised the issue that Appellants' home could not be defined as a "trailer house" under the Clackamas County zoning ordinance. Appellants' Assignment of Error No. 4 raised the issue that the classification of Appellants' home as a "trailer house" denied them equal protection of the laws.

The decision of the Court of Appeals of the State of Oregon, filed August 17, 1977, found the distinction between mobile homes and conventionally constructed homes constitutional, but held the definition of a "trailer house" inapplicable to Appellants' mobile home.

Appellee filed its Petition for Review in the Supreme Court of the State of Oregon on September 14, 1977. The applicability of the definition of "trailer house" to Appellants' home and

the constitutionality of the classification of Appellants' home as a mobile home were briefed and argued.

The Opinion of the Supreme Court of the State of Oregon was filed on May 23, 1978. The Supreme Court reversed the decision of the Court of Appeals, holding that Appellants' home fell within the definition of a "trailer house." In footnote 9 of the Opinion of the Supreme Court, the Court found that the Fourteenth Amendment was inapplicable to the classification of Appellants' home as a "trailer house" since the classification created was of things and not people. The Court further, and alternatively, found that the classification passed the rational basis test under the Equal Protection Clause of the Fourteenth Amendment. (See Appendix "A")

The Mandate of the Supreme Court was entered on May 23, 1978, and issued on June 27, 1978. Appellants timely filed a Petition for Rehearing on June 12, 1978. Appellants' Assignments of Error included the equation of a mobile home with a "trailer house," the inapplicability of the Fourteenth Amendment to the classification of Appellants' mobile home as a "trailer house," and the use of a rational basis test for the analysis of that classification. Appellants' Petition for Rehearing was denied on June 21, 1978.

Appellants filed their Notice of Appeal and Request for Certification of the Record to this Court in the Supreme Court of the State of Oregon with a copy to the Circuit Court of the State of Oregon for Clackamas County on June 30, 1978, and July 3, 1978, respectively.

THE QUESTIONS ARE SUBSTANTIAL

1. Land use planning which excludes mobile homes virtually eliminates the possibility of home ownership by a substantial number of citizens.

The mobile home provides Oregonians with detached housing which, unlike most new and existing single-family dwellings, is affordable by low and moderate income households. According to the Oregon Mobile Home Dealers' Association, in 1974, the average-priced mobile home cost $9,800. This figure rose to $11,400 in 1975, and to $13,200 in July, 1976. In 1974, the average cost of new, conventionally built homes in Clackamas County was $29,704. This cost rose to $35,479 in 1975, and to $41,609 in 1976. The average price of a used house in the Portland Metropolitan Area (encompassing Clackamas County) rose from $28,760 in 1974 to $32,940 in 1975. A recent nationwide study indicates that in 1976, "the median price of existing [single-family] homes sold was $38,100; for new housing it was $44,200." (Joint Center for

Urban Studies of M.I.T. and Harvard University, The Nation's Housing: 1975-1985,, page 102 (1977)). The American Bar Association Advisory Committee on Housing and Urban Growth has adopted these findings. (American Bar Association Advisory Committee on Housing and Urban Growth, Richard P. Fishman, ed., Housing for All Under Law, Ballinger Publishing Co. (1978), pp. 2-3).

According to the M.I.T. study, if trends from 1971 to 1976 were to continue five more years, "typical new homes in 1981 would sell for $78,000 and only the most affluent groups would be able to afford them." (The Nation's Housing, supra at page 116). The median family income in Clackamas County in 1976 was $15,590, rising from $10,367 in 1969. In 1976, fifty percent of the residents of Clackamas County had incomes of $15,400 or less. At the institution of this suit, Appellants' annual income was $14,000. It is obvious that Oregonians' incomes cannot keep pace with the rising cost of conventional housing.

It is equally obvious that Oregonians' incomes cannot keep pace with the rising cost of rental housing. As of 1976, the Department of Housing and Urban Development determined that the average fair market rental for a three-bedroom non-elevator rental unit was $234 per month. The Housing Division of the State of

Oregon determined that in the year 1974, 24.8 percent of Clackamas County residents renting dwellings were paying more than 25 percent of their gross family income for rent. The average monthly mobile home space rental fee in Clackamas County was $59.90 in 1976.

While it is apparent from these statistics that mobile home space rental represents a significant decrease in rental expense, in 1976, the vacancy rate for mobile home spaces in rental parks in Clackamas County was 1.7 percent. In 1976, there were no mobile home park spaces in Clackamas County available for Appellants' home. Further, few mobile home park applications have received approval by Appellee in recent years.

The state of the housing market and the zoning restrictions virtually eliminate the possibility that many Clackamas County families may some day own the homes in which they live. Conventional housing is beyond the means of families with moderate incomes, and the Clackamas County zoning ordinance virtually excludes the placement of mobile homes on parcels of land which these families can afford.

The Clackamas County zoning ordinance only allowed individual mobile homes as outright uses in the Timber Districts. The Timber Districts required minimum lot sizes of 20 and 40 acres. Mobile

home parks were permitted in some zoning districts. The Recreational Residential District in which is located the Dunhams' property allows mobile home parks as a conditional use. The Oregon Supreme Court withdrew its incorrect interpretation of subsequent amendment to the zoning ordinance. (See Appendix "A")

2. This case presents new issues involving the proper exercise of the police power.

In Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), this Court stated that a zoning ordinance must be clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare before it can be declared unconstitutional. The legislative judgment must be allowed to control if a classification for zoning purposes is fairly debatable. In Euclid, an ordinance restricting the intensity of use of the defendant's property was upheld as a rational attempt to reduce danger of fire or collapse of buildings, reduce overcrowding, preserve the residential character of neighborhoods, and increase traffic safety.

Relying upon Euclid, this Court in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), upheld a city ordinance limiting the occupancy of one-family dwellings to a single-family defined to exclude more than two persons not related by blood,

adoption or marriage. This Court upheld the ordinance, citing control of population density, traffic, parking of automobiles, noise and preservation of family and youth values as bases for the ordinance.

Euclid and Belle Terre may be distinguished from this case. The ordinances involved in both cases were clearly legislative determinations of the permissible intensity of land use and population density. Both ordinances operated to reduce population density and land use intensity. The ordinance in question here is of exactly the opposite character. While the Dunhams are forbidden to live in a single mobile home on their six acres, the Clackamas County Zoning Ordinance permits as many as 24 mobile homes for rental or sale upon their property. Thus, those valid considerations relating to population density and land use intensity set forth in Euclid and Belle Terre do not enter into this case.

Since the zoning classification in this case is unrelated to the standards considered in Euclid and Belle Terre, such as public health, morals and safety, its relationship to the "public welfare" must be considered. This Court in Berman v. Parker, 348 U.S. 26 (1964), cited in Belle Terre, found that aesthetic considerations may enter into the concept of public welfare. However, in upholding the urban redevelopment plan in Berman, the Court repeatedly noted that

aesthetics were only one of many considerations in the proposed condemnation of Appellant's department store. The decision was based upon a legislative determination that the entire area involved must be redesigned to eliminate the causes and reappearance of slums.

The Dunham request for judicial protection differs from that sought by the landowner in Berman. Appellee has not adopted any ordinance regulating or enunciating aesthetic standards for any building. The applicable building code does not prescribe aesthetic standards for mobile homes or site-built homes. No evidence exists in the record of any aesthetic objections to the Dunham home.

This Court has not addressed the issue as to whether uncodified and unarticulated aesthetic standards are sufficient to sustain the constitutionality of a zoning ordinance. The Berman decision correctly holds that the police power may achieve aesthetic ends. This Court, however, has never upheld the exercise of the police power on the sole basis of aesthetic standards.

3. The Oregon Supreme Court misconstrues the threshold requirements necessary to support an equal protection analysis.

At paragraph 6 of footnote 9 of the Oregon Supreme Court Opinion (See

Appendix "A"), the Court states that the classification established by the Clackamas County Zoning Ordinance ". . .is not subject to protection of the Equal Protection clauses of the Oregon (Art I § 20) or the United States (14th Amendment) Constitutions, since it involves the classification of things, not persons." While it is true that the constitutional provisions cited prohibit the denial to persons of the equal protection of the laws, these sections have never been interpreted to mean that a legislative classification of things which operate to discriminate against a class of persons is not subject to equal protection analysis. In Lynch v. Household Finance Corp., 405 U.S. 538 (1972), this Court rejected any distinction between personal and property rights for the purposes of enforcement of the Fourteenth Amendment because equality in the enjoyment of property rights is an ". . .essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee."

This Court has on numerous occasions applied an equal protection analysis to leglislative classifications of things. Equal protection analysis has, inter alia, been applied to classifications of coal mines, Barrett v. Indiana, 229 U.S. 26 (1913); lodging houses, Queenside Hills, Co. v. Saxl, 328 U.S. 80 (1946); oleo margarine, Hammond Packing

Co. v. Montana, 233 U.S. 331 (1914); and motor vehicles, Storaasli v. Minnesota, 283 U.S. 57 (1931). The Oregon Court has also applied equal protection analysis to a classification of things in Olsen v. State ex rel Johnson, 276 Or. 9, 554 P.2d 139 (1976), cited by the Supreme Court in footnote 9. There, the Oregon Court applied equal protection analysis to a legislative classification of taxable real property--things.

Thus, to support an equal protection analysis, Appellants need only show a legislative classification of people or things which is irrational, is based upon suspect criteria, or which impinges upon the exercise of a fundamental right. Eisenstadt v. Baird, 405 U.S. 438 (1971). The Clackamas County Zoning Ordinance establishes a classification of housing which separates mobile homes from all other forms of housing, including modular, prefabricated and site-constructed housing. As a result, Appellants and all other persons similarly situated are discriminated against in the exercise of their rights to acquire, enjoy, own and dispose of property.

4. The strict scrutiny test must be applied to the Clackamas County Zoning Ordinance.

The Oregon Supreme Court found that the Clackamas County Zoning Ordinance

met the rational basis test. The use of this test was erroneous because the classification established by the zoning ordinance affects the exercise of Appellants' fundamental right to acquire, enjoy, own and dispose of property.

It is well-established that a legislative classification which is suspect or which affects the exercise of a fundamental right must be subjected to strict scrutiny by the Court. Eisenstadt, supra. Thus, the classification must be necessary to promote a compelling governmental interest. Shapiro v. Thompson, 394 U.S. 618, 634 (1968).

In order for the zoning ordinance here to be held necessary to the promotion of Appellee's interests, it must be precise and narrow in its scope, U.S. v. Robel, 389 U.S. 258, 262 (1967), and must be the least restrictive means for achieving the Appellee's purpose, Shelton v. Tucker, 364 U.S. 479, 488 (1960). The Oregon Supreme Court failed to address the necessity of the zoning ordinance in its present form to the promotion of the Appellee's purposes. The total exclusion of mobile homes from all residential districts in Clackamas County is not necessary to the Appellee's stated purposes of upgrading of construction standards, regulation of housing density, preservation of aesthetic and property values. It is clear that Appellee is in agreement with this position because § 22.3 of the

zoning ordinance permits mobile homes as a conditional use in Recreational Residential Districts while forbidding individual mobile homes. Further, other more narrowly drawn and less restrictive means for achieving the above-stated purposes are already in existence or are easily developed.

Both the federal government and the State of Oregon have preempted Appellee from the regulation of all aspects of the construction of mobile homes. Both the County Comprehensive Plan and the zoning ordinance regulate housing densities. No aesthetic standards exist in either the zoning ordinance or applicable building codes for any type of building. A mobile home may be built to look like a site-constructed home, and a site-constructed home may be built to look like a mobile home. If Appellee desires to maintain certain aesthetic standards, it could enact a design-review ordinance for all new housing. Finally, the protection of property values can be achieved by the reasonable application of Appellee's nuisance abatement procedures, as a mobile home is not a nuisance per se.

5. The Supreme Court's decision has substantially increased the cost of mobile homes.

Oregon courts have generally held that a building attached to land is considered to be a part of the real property. The

State of Oregon requires counties to assess and tax mobile homes as real property if the owner of the home owns the land upon which it is situated. The Oregon Supreme Court's decision increases the cost of owning a mobile home in Oregon.

Commercial banks or savings and loan associations may charge a maximum interest rate of 15 percent per annum for a loan for a mobile home which is personal property. The maximum interest rate for a loan for residential real estate is 12 percent per annum. The State of Oregon Veterans' Loan Program requires that loans for mobile homes which are personal property shall be made at an interest rate equal to two percent more than the interest rate for loans for mobile homes which are real property.

It is well known that interest rates are approximately 25 percent lower for loans secured by real property as opposed to loans secured by personal property. Both federal and state administrative rules for banks and savings and loan associations authorize longer terms and greater maximum amounts financed for loans secured by real property as opposed to loans secured by personal property.

The Oregon Supreme Court's classification of a mobile home as personal property

will restrict lending institutions from offering mortgage loans on mobile homes. Consumers will be required to pay approximately 30-40 percent more for a mobile home financed as personal property as opposed to real property.

6. The Oregon Supreme Court's decision illustrates the dangers involved in land use decisions based upon aesthetic standards.

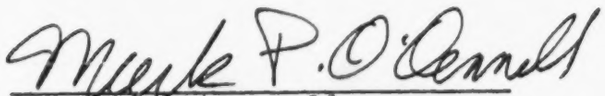
The danger of exercising the police power under the guise of aesthetics has been well articulated by Richard Babcock. He states:

> Once we have disposed of the "bad guys" represented by billboards and junk yards, there is a danger that we will shift our campaign for natural beauty into one labeled aesthetics and then direct our communal wrath to that which is different or merely "out."

It is submitted that the decision of the Supreme Court of the State of Oregon denies Appellants the equal protection of the laws and that the decision is in error. We believe that the questions presented by this appeal are substantial

and that they are of public importance.

Respectfully submitted,



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APPENDIX "A"

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APPENDIX "A"

IN THE CIRCUIT COURT OF THE STATE
OF OREGON
FOR THE COUNTY OF CLACKAMAS

CLACKAMAS COUNTY, a political subdivision of the State of Oregon, Plaintiff vs. WILLIAM T. DUNHAM and MARY LOU DUNHAM, husband and wife, Defendants	No.91323 MEMORANDUM OPINION

It is the opinion of this Court that the term "trailer house" and "mobile home" as used in the Clackamas County Comprehensive Plan and Zoning Ordinance is synonymous. That the definition of such structures is a "building designed in such a manner that it may be moved from one location to another."

It is in fact a mobile home and/or trailer house and was designed in such a manner that it could be moved from one location to another. The cutting off of the undercarriage does not change the character of the structure since the above definition refers to the design. Further, the Zoning Ordinance provides that the undercarriage of such structures not be removed. Therefore, the structure located on defendants' property is in

APPENDIX "A"

violation of the Zoning Ordinance of Clackamas County affecting that property.

The Zoning Ordinance is not so vague and overbroad so as to render it a violation of the defendants' constitutional rights.

The Zoning Ordinance does not establish such a "policy of exclusion" that renders it in violation of the defendants' constitutional rights.

The Zoning Ordinance and its application is not arbitrary, unreasonable, capricious, confiscatory or oppressive so as to be in violation of defendants' constitutional rights.

The provisions of the Zoning Ordinance are not in violation of or inconsistent with the Clackamas County Comprehensive Plan. The Zoning Ordinance may be more restrictive than the Comprehensive Plan as to the uses available to a particular piece of property. This does not render the Zoning Ordinance invalid. It is only when the Zoning Ordinance attempts to enlarge on the uses available over those expressed in the Comprehensive Plan that the Ordinance is invalid.

Therefore, defendants' placement of the structure upon their land is in violation of the Clackamas County Zoning Ordinance and by law constitutes a nuisance, and the plaintiff is entitled to a decree permanently enjoining the defendants from

APPENDIX "A"

further violation of the Zoning Ordinance by the maintenance of this structure upon their property.

DATED this 3rd day of June, 1976.

/s/ Winston L. Bradshaw
JUDGE

APPENDIX "A"

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

CLACKAMAS COUNTY, a political subdivision of the State of Oregon, Plaintiff,	No.91323
vs.	DECREE
WILLIAM T. DUNHAM and MARY LOU DUNHAM, husband and wife, Defendants	

The above-entitled matter having come on regularly before the Honorable Winston L. Bradshaw, Judge of the above-entitled Court, for trial, and statements having been heard on behalf of the parties, evidence having been produced on behalf of the parties, and having considered the Trial Memoranda of the parties, and the Court having made and filed herein its written Memorandum Opinion dated June 3, 1976;

This order hereby incorporates the said Memorandum Opinion with its findings of fact and conclusions of law.

NOW, THEREFORE, IT IS HEREBY ORDERED and DECREED that the use by the defendants of a mobile home as a residence on the real property described in Paragraph

APPENDIX "A"

II of the plaintiff's Second Amended Complaint herein is a public nuisance being in violation of the Clackamas County, Oregon, Zoning Ordinance and is hereby permanently abated; and

IT IS FURTHER ORDERED AND DECREED defendants, William T. Dunham and Mary Lou Dunham, husband and wife, their heirs and assigns, are hereby permanently enjoined from maintaining a mobile home and/or trailer house as a residence upon the real property described in Paragraph II of the plaintiff's Second Amended Complaint herein; and

IT IS FURTHER ORDERED AND DECREED that the plaintiff, Clackamas County, is hereby granted judgment against the defendants for their costs and disbursements incurred herein and taxed at $43.30.

DATED this 27th day of July, 1976.

/s/ Winston L. Bradshaw
JUDGE

No. 420—August 17, 1977

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CLACKAMAS COUNTY, *Respondent,*
v.
DUNHAM et ux, *Appellants.*
(No. 91323, CA 6817)

Appeal from Circuit Court, Clackamas County.

Winston L. Bradshaw, Judge.

Argued and submitted May 25, 1977.

Mark P. O'Donnell, Portland, argued the cause for appellants. With him on the brief were John W. Shonkwiler and O'Donnell, Rhoades & Gerber, Portland.

Scott H. Parker, Clackamas County Counsel, Oregon City, argued the cause and filed the brief for respondent.

Before Schwab, Chief Judge, and Lee and Johnson, Judges.

Reversed.

JOHNSON, J.

Lee, J., concurring opinion.

Schwab, C. J., dissenting opinion.

JOHNSON, J.

Defendants appeal the trial court decree declaring their mobile home a public nuisance and enjoining its use as a residence on defendants' property. On October 1, 1972, defendants erected a "double wide" mobile home on their property which is designated as RR (Recreational Residential) by Clackamas County. The county zoning ordinance provides:

"* * * * *

"22.3 Permitted Uses:

"In a recreational residential district, the following uses are allowed as hereinafter provided:

"A. Principal uses

"1. One single-family dwelling unit per lot or parcel of land.

"B. Conditional uses

"1. The following uses may be allowed as a conditional use subject to Section 8 and Section 12.4, procedure for public hearing, of this Ordinance:

c. Mobile home parks, with an allowable maximum density of four (4) mobile homes per acre;

"* * * * *"

Defendants do not have a conditional use permit. Section 3.2 of the ordinance sets forth the pertinent definitions:

"* * * * *

"Dwelling. A building designed for residential occupancy, but not a house trailer. * * *

"Dwelling, Single-Family. A detached building containing one kitchen, designed for and occupied exclusively by one family and the household employees of that family, but not a trailer house. * * *

"* * * * *

"Trailer Houses. Building designed in such a manner that it may be moved from one location to another."

The structure in question has 1,500 square feet and

is 65 × 24 feet. It was constructed and transported in two separate units which were subsequently anchored to a preconstructed foundation and bolted together. The house contains a kitchen, living room, dining room, family room, utility room and three bedrooms. The tongue, axles, wheels and springs were removed when the house was erected. The foundation has subsequently been skirted, a front porch added together with a back patio. The surrounding property has been landscaped, fenced, and a circular driveway installed. The structure has the appearances of a conventionally constructed home. The county contends the structure is a "trailer house" and thus a nonpermitted use.

In *Clackamas County v. Ague*, 27 Or App 515, 556 P2d 1386 (1976), Sup Ct *review denied* (1977), we held that the subject ordinance was constitutional in that a county could make a reasonable classification between conventionally constructed homes and mobile homes, stating:

> "Defendants' most recognizable constitutional argument is an equal protection claim: that it is unconstitutional to distinguish between conventionally constructed homes and mobile homes. Such a distinction may, as most of defendants' argument attempts to show, be unwise. But the equal protection inquiry is only for minimum rationality. The distinction is minimally rational for several reasons; to cite only one, it is widely believed by realtors, tax appraisers, etc. that conventionally constructed homes tend to appreciate in value while mobile homes tend to depreciate in value. This is sufficient to enable zoning ordinances to distinguish between the two forms of housing. [Citing case.]" 27 Or App at 518

A pertinent constitutional question, which was not raised in either *Ague* or here and which we do not reach, is whether the ordinance definition of "trailer house" is sufficiently certain for purposes of determin-

ing a non-permitted use.[1] The question points up the underlying problem in applying a vague statute in this injunction proceeding.[2] Conceivably, any building "may be moved from one location to another." The ordinance presumably refers to structures that are readily movable, but there is no standard provided either to those charged with the enforcement or for the courts for making such determination. *See Lane County v. Heintz Const. Co.*, 228 Or 152, 364 P2d 627 (1961).

The additional descriptive phrase in the definition "designed in such manner" adds little to our enlighten-

[1] With all due respect for the dissenting opinion of Chief Judge Schwab, there is no implication that we would hold the ordinance definition to be unconstitutionally vague. We mention this possible constitutional issue because the case illustrates the difficulty posed by attempting to apply the vague statutory language to concrete facts. The difficulty is compounded by changing technology. In the past the terms "trailer house" or "mobile home" were commonly understood to refer to a type of vehicular equipment. However, because of changing technology the term "mobile home" appears to encompass more than just vehicular equipment. Mobile home construction apparently has become a method of prefabricating and transporting components for residential structures of a stationary nature. The Clackamas County Ordinance may prohibit the latter type of structure if there is proof that the in-place structure is still movable. However, irrespective of any constitutional question presented, there are more precise definitions available such as those quoted in footnote 2 which prohibit this type of structure.

[2] In *Columbia County v. Kelly*, 25 Or App 1, 548 P2d 163, Sup Ct *review denied* (1976), we upheld a zoning ordinance which differentiated between mobile and conventional homes. Significantly, the ordinance at issue there, unlike the Clackamas County ordinance, applied not only a portability test in defining a mobile home, but also looked to other physical characteristics. The ordinance defined mobile home to be:

> " 'Any vehicle or similar portable structure having no foundation other than wheels, jacks or skirtings and so designed or constructed as to permit occupancy for living or sleeping purposes.' " 25 Or App at 5

2 R. Anderson, American Law of Zoning 2d, § 14.03, points to an even more explicit ordinance of Charlotte, North Carolina, which defines a mobile home as follows:

> " 'A movable or portable dwelling over thirty-two (32) feet in length and over eight (8) feet wide, constructed to be transported on its own chassis and designed without a permanent foundation, whether or not a permanent foundation is subsequently provided, which includes one or more components that can be retracted for transporting purposes and subsequently expanded for additional capacity, or two (2) or more units separately transportable but designed to be joined into integral unit, as well as a portable dwelling composed of a single unit.' "

ment. The term "design" infers that the structure is constructed with a conscious intent that it may be moved in the future. The requisite design feature must be interpreted to be prospective and not to refer to initial construction. Otherwise the ordinance would be a prohibition on all buildings. Any structure is movable in its initial construction. Materials must be delivered to the site. Even a conventionally constructed home entails some components, such as cabinets, that are prefabricated and assembled before delivery to the site. The modern prefabricated or modular house involves even fewer components that are readily movable to the site. The county's only witness, a planner, testified that in his opinion the ordinance does not prohibit prefabricated modular homes. The definition is not concerned with the portability of materials or components to the construction site, but whether the design of the "building," completed and in place, contains features that make it movable from one location to another.

Defendant contends that the county has not proved that defendants' home was a trailer house as defined in the ordinance. The sole witness for the county was a planner who investigated zoning violations and investigated the alleged violation at issue here. He stated that the only basis for determining whether defendants' home was a trailer house was his visual inspection and "the state insignia" affixed to the building. Presumably the state insignia reference is that which may be required under ORS 446.170.[3] Such insignia merely indicates compliance by the manufacturer with certain state requirements "to protect [against] * * *

[3] ORS 446.170 provides:

> "(1) Trailers and recreational vehicles subject to the provisions of ORS 446.155 to 446.200, and trailers and recreational vehicles upon which alterations of installations of plumbing, heating, illuminating, cooking or electrical equipment are made shall have affixed thereto an insigne of compliance.
>
> "(2) No person shall place an insigne of compliance on a trailer or recreational vehicle except as provided by ORS 446.155 to 446.200 and the rules and regulations promulgated thereunder."

substandard and unsafe plumbing, heating, illuminating, cooking and electrical equipment and installations." ORS 446.185(2). The insignia is not evidence of whether the structure may be moved from one location to another.

The county's witness conceded upon cross examination that there was nothing from his visual examination from which he could distinguish between defendants' home and conventionally constructed homes as to movability or otherwise. The defendant testified to the construction of the foundation, the bolting together of the two units and anchoring the units to the foundation, removal of the tongue, axles, wheels and springs, the skirting of the foundation and construction of the adjoining porch, patio and fences. The county made no effort to rebut any of this evidence or to show that these steps had not rendered the structure immovable.

The county attempts to rely on defendant's admission that the structure is characterized as a "mobile home" and that the terms "mobile home" and "trailer house" are used interchangeably in the Clackamas County ordinance. In *Clackamas County v. Ague, supra,* 27 Or App at 515, we acknowledged the interchangeability of these terms in the ordinance. The defect in the county's argument is that the ordinance does not define "mobile home" and thus the definition of "trailer house" is applicable. The fact that defendants' home is called a "mobile home" and that it was originally transported on wheels in two units does not make it a trailer house. The issue is not how the building arrived on the site, but whether *in place* it retained design features that made it readily movable from its location. The record is devoid of any evidence of movability. Plaintiff has failed to prove that defendants' home is a trailer house.

In *Clackamas County v. Ague, supra,* the appellant also argued that his mobile home would not constitute a trailer house. Our opinion in that case did not deal with that issue, but merely upheld the statute as to the

constitutionality of the classification. The facts in that case are different in that there the mobile home was a single unit stored on the property with its wheels intact. In *Yates v. Schumacher,* 29 Or App 449, 563 P2d 771 (1977), we affirmed, Per Curiam citing *Ague,* an injunction abating a mobile home as a nuisance under the Clackamas County ordinance. The mobile home at issue there was practically identical to defendants'. The only distinction is that in *Yates* the county instituted proceedings before the construction was completed. It is doubtful that the factual differences in either *Yates* or *Ague* were of substantive significance. Appellants in both cases made the same assignments of error as made here. However in both those cases, as here, appellant relied primarily on arguments relating to the constitutionality of the classification. In any event we did not address in our opinions in *Ague* or *Yates* the assignments of error relating to the county's failure of proof that the mobile homes in question were trailer houses and to that extent we were in error.

Reversed.

LEE, J., concurring.

I concur because the county failed to prove that defendant's "mobile home" is a "trailer house." We erred in *Clackamas County v. Ague,* 27 Or App 515, 556 P2d 1386 (1976), Sup Ct *review denied* (1977), when we equated "mobile home" with "trailer house"— to that extent *Ague* and its progeny should be modified. Technological evolution requires an appropriate definition of "mobile home." I agree with the dissent that the issue of vagueness should not be raised.

SCHWAB, C. J., dissenting.

We have had a series of cases, all from Clackamas County, in which the same attorney, apparently in part representing a mobile home trade association, has

repeatedly presented "Brandeis briefs" about the wisdom and desirability of allowing mobile homes. Were I a state or local legislator, I would find many of these arguments cogent. However, until today these arguments were not deemed judicially cognizable by a single judge. Today the perseverance of repeatedly praising the virtues of mobile homes produces a majority opinion holding that mobile homes are an outright permitted use in all single family residential zones in Clackamas County.

I disagree with this conclusion, and specifically disagree with the majority on three points: (I) the constitutionality of the zoning ordinance; (II) the interpretation of the ordinance; and (III) the application of the ordinance in this case.

I

The majority implies that the definition of mobile home in the Clackamas County Zoning Ordinance—"Building designed in such a manner that it may be moved from one location to another"—might be void for vagueness. As the majority notes, that issue "was not raised" by the parties in the trial court or this court. 30 Or App at 598. The majority next claims "we do not reach" the vagueness issue. 30 Or App at 598. But the majority then enters into a discussion of the issue, the thrust of which is that, had it only been raised, the definition of "trailer house" in the Clackamas County Zoning Ordinance would be held unconstitutionally vague.[1]

This suggestion is fraught with potential for wreaking havoc with Oregon land-use law which, appropri-

[1] After referring in text to vagueness being a "pertinent constitutional question" and complaining that the ordinance provides "no standard," 30 Or App at 598-99, in a footnote the majority claims only the intent to point out "there are more precise definitions available." 30 Or App at 599, n 1. If the majority's textual comments do not at least imply that the zoning ordinance is unconstitutionally vague, then with all due respect, I do not think it is any of our business to make gratuitous comments on the relative precision of statutory definitions.

ately I submit, is filled with elastic terms. What is "public convenience" and "traffic congestion"? *See Jehovah's Witnesses v. Mullen et al,* 214 Or 281, 330 P2d 5, 74 ALR2d 347 (1958), *appeal dismissed and cert den* 359 US 436 (1959). What is a "detached accessory structure"? *See, Unker v. Means,* 271 Or 56, 530 P2d 846 (1975). What is a "commercial amusement establishment"? *See, Clatsop County v. Morgan,* 19 Or App 173, 526 P2d 1393 (1974). What are areas of "predominantly" Class I to IV soils that generally cannot be lots smaller in size than "appropriate for the continuation of the existing commercial agricultural enterprise within the area"? Land Conservation and Development Commission, Oregon Administrative Rule 660-10-060, Appendix A, p 13, Goal 3—Agricultural Lands. My point is that Oregon land-use law contains many terms at least as ambiguous as the Clackamas County definition of a mobile home. The majority's vagueness discussion casts doubt, to say the least, on the validity of a large body of law.[2]

Since the majority has spontaneously raised the vagueness problem, I feel it necessary to respond. The vagueness doctrine was discussed in *Palen v. State Bd. Higher Education,* 18 Or App 442, 446-47, 525 P2d 1047, Sup Ct *review denied* (1974):

> " 'The root of the vagueness doctrine is a rough idea of fairness.' *Colten v. Kentucky,* 407 US 104, 110, 92 S Ct 1953, 32 L Ed 2d 584 (1972). The ultimate criterion being fairness, the degree of precision required in statutes and regulations varies somewhat depending upon the context. At one end of the spectrum—where the greatest

[2] The majority cites certain provisions from ORS ch 446, which contains extensive state statutes on the subject of mobile homes. The statutory definition of the subject to which these statutes apply reads:

> " 'Mobile home' means a vehicle or structure constructed for movement on the public highways, that has sleeping, cooking and plumbing facilities, is intended for human occupancy and is being used for residential purposes." ORS 446.003(19).

If the majority has doubts about the constitutionality of the Clackamas County definition, i.e., designed to be moved, I presume these same doubts would apply to ORS ch 446 which is built on the foundation of substantially the same definition, i.e., constructed for movement.

degree of precision is required—are statutes defining crimes. *See, State v. Hodges,* 254 Or 21, 547 P2d 491 (1969); *City of Portland v. White,* 9 Or App 239, 495 P2d 778, Sup Ct *review denied* (1972). Toward the other end of the spectrum are, for example, statutes defining the relationship between a governmental employer and its employes—statutes that typically articulate a common standard applicable to myriad different employes performing widely disparate tasks.

"Thus, the United States Supreme Court has upheld broadly worded statutory standards in the context of public employment. *Arnett v. Kennedy,* 416 US 134, 94 S Ct 1633, 40 L Ed 2d 15 (1974), and *CSC v. Letter Carriers,* 413 US 548, 93 S Ct 2880, 37 L Ed 2d 796 (1973), are the leading examples. In *Arnett* the court upheld 5 USC § 7501 which provides that federal civil service employes could be discharged 'only for such cause as will promote the efficiency of the service.' In *Letter Carriers* the court upheld the Hatch Act prohibition against certain federal employes taking 'an active part in political management or in political campaigns.' 5 USC § 7324(a)(2). *See also, Broadrick v. Oklahoma,* 413 US 601, 93 S Ct 2908, 37 L Ed 2d 830 (1973)."

Where on the continuum between required precision and permitted imprecision do land-use regulations fall? I would hold that in some instances the nature of the subject requires at least as much permitted imprecision as in the public employer-employe context involved in *Palen.*

The uses to which land can be put are only limited by the seemingly infinite ingenuity of man, ranging from a wilderness preserve to a strip mine. Governmental efforts to control land use can only be as specific as the subject matter permits.[3] An example is the previously cited LCDC Agricultural Lands Goal—an attempt to define, in a few manageably brief paragraphs, the millions of acres in the State of

[3]Some land-use controls, such as height limitation, can be stated with mathematical precision. Other issues, such as the siting of a nuclear power plant, simply cannot be determined based on precise standards of general applicability. *See Marbet v. Portland Gen. Elect.,* 277 Or 447, 460-63, 561 P2d 154 (1977).

Oregon where the principal permitted use must be agricultural. I refuse to join the majority's implication that the Agricultural Lands Goal and much of Oregon land-use law is unconstitutionally vague.

II

In the constitutional discussion, the majority complains "there is no standard provided * * * to * * * the courts for making" the determination of what is a mobile home. 30 Or App at 599. Yet the majority apparently has no difficulty in deciding what we have here is not. The majority is in fact actually supplying the standard through an interpretation of the definition of mobile home in the Clackamas County Zoning Ordinance.

In my dissent in *Columbia County v. Kelly,* 25 Or App 1, 548 P2d 163, Sup Ct *review denied* (1976), I stated that local governments are free to define mobile home in such a way that "once a mobile home, always a mobile home." 25 Or App at 8. Whether the zoning ordinance involved in that case had done so was the question that divided the court.

Again that issue splits us. As I read it, the Clackamas County definition—"Building designed in such a manner that it may be moved from one location to another"—does mean "once a mobile home, always a mobile home." The definition only requires determination of whether a building, at the moment construction was completed, was designed so as to be readily portable—always assuming, of course, that it has not been so substantially altered as to lose its original identity.

It is not clear to me whether the majority intends to hold that local governments are powerless to provide "once a mobile home, always a mobile home." It is clear to me that the majority intends to hold that the Clackamas County Zoning Ordinance does not do so. This partial clarity emerges from the majority's repeated emphasis that the question is whether defend-

ants' abode is a mobile home "in place." 30 Or App at 600, 601.

The majority reasons the completed-and-in-place test "must" be adopted because all construction involves "components that are readily movable to the site." 30 Or App at 600. The fallacy here is that the Clackamas County definition focuses on whether a building is designed to be moved as a *unit;* the portability of the components that make up a building is irrelevant.

III

Our divergent theories of the application of the zoning ordinance follow from our different interpretations. The majority apparently believes defendants' abode was a mobile home the day it was towed onto defendants' property, stating: "On October 1, 1972, defendants erected a 'double wide' mobile home on their property * * *." 30 Or App at 597. In the majority's view, this building ceased being a mobile home when the tongue, axles, wheels and springs were removed because it was no longer "designed to be moved" within the meaning of the ordinance.[4]

On the other hand, under my "once a mobile home, always a mobile home" interpretation of the ordinance, defendants' abode is now a mobile home. Its continued occupation and use is in violation of the zoning ordinance. I would affirm the trial court's injunction abating this illegal use.

IV

In summary, the majority today makes a sweeping holding: that mobile homes, once the axles, wheels,

[4]The prevailing opinion and the concurring opinion repeatedly state the county failed to prove defendants' abode is a mobile home, suggesting that this case is being decided on a narrow factual basis. Actually, the majority's conclusion is based on a broad legal holding: that a building ceases being "designed to be moved" once the wheels, etc., are removed. Under this legal standard, it is impossible for the county to present any evidence that would establish that a mobile home sans wheels remains a mobile home.

etc., are removed, are an outright permitted use in all Clackamas County single family residential zones. This follows from the majority's implicit conclusion that if defendants' abode is not a prohibited mobile home it must be a permitted single family dwelling. This holding will undoubtedly come as a surprise to defendants' neighbors who watched defendants' abode towed onto the subject property. In common sense and common usage, defendants' neighbors would have regarded the thing they saw towed into the neighborhood as a mobile home. But, according to the majority, it ceased to be a mobile home once the wheels were removed. "It is a scheme which would fool only a lawyer." *Martin v. Oregon Building Authority,* 276 Or 135, 145, 554 P2d 126 (1976).

I respectfully dissent.

No. 113—May 23, 1978

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc*

CLACKAMAS COUNTY, *Petitioner,*
v.
DUNHAM et ux, *Respondents.*
(TC 91323, CA 6817, SC 25644)

On review from the Court of Appeals.**

Argued and submitted March 6, 1978.

Scott H. Parker, Clackamas County Counsel, Oregon City, argued the cause and filed a brief for petitioner.

Mark P. O'Donnell, of O'Donnell, Rhoades & Gerber, Portland, argued the cause for respondents.

Reversed.

LENT, J.

Howell, J., dissenting opinion.

Linde, J., dissenting opinion.

*Tongue, J., not participating.

**Appeal from Circuit Court, Clackamas County. Winston L. Bradshaw, Judge. 30 Or App 595, 567 P2d 605 (1977).

LENT, J.

This case involves the construction and application only of a Clackamas County Zoning Ordinance (Ordinance) as it pertains to defendants' mobile home. In 1975, Clackamas County filed suit to enjoin defendants' use of their mobile home as a residence and to abate such use as a public nuisance pursuant to ORS 215.180 (1975) and 215.185 (1975).[1] The trial court found that defendants' use of their mobile home as a residence violated the Ordinance, declared it a public nuisance and ordered it enjoined and permanently abated. The defendants appealed to the Court of Appeals, which, by a divided court, reversed, *Clackamas County v. Dunham et ux,* 30 Or App 595, 567 P2d 605 (1977), and held that defendants' mobile home was an outright permitted use under the Ordinance. We allowed review to address an apparent inconsistency between this result and that reached in *Clackamas County v. Ague,* 27 Or App 515, 556 P2d 1386, S Ct *rev den* (1976).

The essential facts are undisputed. Prior to October 1, 1972, defendants owned a 8-acre parcel in eastern Clackamas County, which bore the zoning designation

[1] ORS 215.180 (1975), repealed by 1977 Or Laws ch 766 § 16, provided:

"The location, erection, construction, maintenance, repair, alteration or use of a building or other structure, or the subdivision, other partitioning, or use of land, in violation of an ordinance or regulation authorized by ORS 215.010 to 215.190 and 215.402 to 215.422 shall be deemed a nuisance."

ORS 215.185 (1975), amended by 1977 Or Laws ch 766 § 6, provided:

"In case a building or other structure is, or is proposed to be, located, constructed, maintained, repaired, altered, or used, or any land is, or is proposed to be, used, in violation of an ordinance or regulation authorized by ORS 215.010 to 215.190 and 215.402 to 215.422, the governing body or district attorney of the county or a person whose interest in real property in the county is or may be affected by the violation, may, in addition to other remedies provided by law, institute injunction, mandamus, abatement, or other appropriate proceedings to prevent, temporarily or permanently enjoin, abate, or remove the unlawful location, construction, maintenance, repair, alteration, or use. When a temporary restraining order is granted in a suit instituted by a person who is not exempt from furnishing bonds or undertakings under ORS 22.010, the person shall furnish undertaking as provided in ORS 32.010 to 32.060."

of "RR" (Recreational Residential). This designation allowed a "single family dwelling" as the only outright permitted use.[2] The Ordinance, passed in 1960,[3] defines "single family dwelling" as:

> "A detached building containing one kitchen, designed for and occupied exclusively by one family and the household employes of that family, but not a *trailer house*." (emphasis added) Clackamas County Zoning Ordinance, § 3.2.

A "trailer house," in turn, is defined by the Ordinance as a:

> "* * * building designed in such a manner that it may be moved from one location to another." (§ 3.2)

Finally, a "building" is defined as:

> "* * * any structure built for the support, shelter, or enclosure of any person, animals, chattels or property of any kind." (§ 3.2)

On October 1, 1972, the defendants installed the structure which is the subject of this suit on their land. The structure, which is known as a "double wide mobile home," consists of two units which are bolted together and measures 68 feet by 24 feet (approximately 1500 square feet of usable living space). Each unit was manufactured with a chassis which included

[2]Clackamas County Zoning Ordinance, § 22.3, provides, in pertinent part:

"22.3 Permitted Uses:

"In a recreational residential district, the following uses are allowed as hereinafter provided:

"A. Principal uses

"1. One single-family dwelling unit per lot or parcel of land.

"B. Conditional uses

"1. The following uses may be allowed as a conditional use subject to Section 8 and Section 12.4, procedure for public hearing, of this Ordinance:

* * * * *

c. Mobile home parks, with an allowable maximum density of four (4) mobile homes per acre; * * *"

[3]In March 1976, the Clackamas County Zoning Ordinance was revised to redefine "mobile home[s]" and to allow their use as residences outside of mobile home parks in all residential zoning districts except "RR," which remains unchanged.

a tongue with springs and three axles attached. Two wheels were attached to each axle. Each unit was delivered independently to the defendants' property behind a diesel tractor. The defendants had poured a concrete foundation prior to the delivery of the two units. When the units arrived, the defendants removed the tongue, axles, wheels and springs with a cutting torch and had the units placed side by side on the foundation. The units were then bolted together and anchored down. The structure contains a kitchen, living room, dining area, family room, utility room, three bedrooms and two bathrooms. It has self-contained heating, plumbing and electrical systems.

Defendants immediately began to reside in the structure and, with their children, have been its only occupants. The structure was skirted, and a front porch and backyard patio were added. Defendants' property was landscaped and fenced. A circular unpaved driveway leads from a two-lane highway to the defendants' structure.[4]

In September 1973, plaintiff's agents investigated the structure in question, identified it as a "trailer house" under the Ordinance, and informed defendants that they were in violation thereof. In April 1975, plaintiff filed a complaint seeking an injunction against defendants' further use of their mobile home as a residence in violation of the Ordinance and a permanent abatement of the public nuisance which defendants' use allegedly constituted. Defendants denied the violation and interposed various affirmative defenses, including allegations that their house was a single-family dwelling and thus an outright permitted use, that the Ordinance was void for vagueness, that the Ordinance was void as applied as violating ORS

[4]The majority opinion below states, "The structure has the appearances of a conventionally constructed home." 30 Or App at 598. After viewing the photograph exhibits, we must disagree with this characterization. The point, however, is not important to our disposition of this case.

215.055 (1975),[5] that the Ordinance was unconstitutional as applied as creating an impermissible classification in violation of the Fourteenth Amendment of the U.S. Constitution and Art I, § 20, of the Oregon Constitution, and that the Ordinance as applied violated the policy provisions of the Clackamas County Comprehensive Plan.

The trial court issued a decree permanently abating defendants' use of the structure as a residence as a public nuisance and enjoining such use. Defendants appealed to the Court of Appeals, assigning as error (1) the trial court's failure to invalidate the application of the Ordinance to the present case as a violation of ORS 215.055 and the policies set out in the Clackamas County Comprehensive Plan; (2) the trial court's failure to deny plaintiff's requested injunction based on plaintiff's "unclean hands"; (3) the trial court's failure to find the Ordinance inapplicable to defendants' particular "mobile home"; and (4) the trial court's failure to find the Ordinance unconstitutional as applied to the defendants as a denial of equal protection.

The Court of Appeals reversed, holding that the defendants' structure was not a "trailer house" under

[5] ORS 215.055(1) (1975) provides:

"Any comprehensive plan and all zoning, subdivision or other ordinances and regulations authorized by ORS 215.010 to 215.233 and 215.402 to 215.422 and adopted prior to the expiration of one year following the date of the approval of state-wide planning goals and guidelines under ORS 197.240 shall be designed to promote the public health, safety and general welfare and shall be based on the following considerations, among others: The various characteristics of the various areas in the county, the suitability of the areas for particular land uses and improvements, the land uses and improvements in the areas, trends in land improvement, density of development, property values, the needs of economic enterprises in the future development of the areas, needed access to particular sites in the areas, natural resources, including incident solar energy and utilization, of the county and prospective needs for development and utilization thereof, and the public need for healthful, safe, aesthetic surroundings and conditions."

the definition in the Ordinance, that it was a single-family dwelling and thus an outright permitted use.[6]

In his dissent, Chief Judge Schwab, decrying the result of the majority's holding—"that mobile homes, once the axles, wheels, etc., are removed, are an outright permitted use in all Clackamas County single-family residential zones"—30 Or App at 608, opines that the definition of "trailer house" in the Ordinance accomplishes what Columbia County had failed to accomplish in *Columbia County v. Kelly*, 25 Or App 1, 548 P2d 163, S Ct *rev den* (1976) (dissenting opinion of Chief Judge Schwab): to embody the principle "once a mobile home [or trailer house], always a mobile home." Plaintiff's petition for review seeks reversal of the Court of Appeals' determination that the defendants' structure was not a "trailer house" as defined by the Ordinance. We reverse and reinstate the trial court decree.

The tenor of the majority opinion below indicates that the decree was being reversed for plaintiff's failure to prove that the structure in question was movable as it sat on its foundation and therefore a "trailer house" under the ordinance definition. We conceive of this case, not as one involving an assessment of the evidence as such, but as one involving the construction of the pertinent sections of the Ordinance and their application to the basically undisputed facts.

We repeat here the definition of "trailer house" given in the Ordinance:

> "• • • building designed in such a manner that it may be moved from one location to another."

Does "designed" refer to design for the manufacture of the building or design for the installation of the building?

[6] The opinion of the court pointedly discusses the vagueness issue but does not resolve it. Judge Lee, in a brief concurring opinion, rejects this discussion, as does the dissent. As the *majority* below indicated, the issue was not properly before the Court of Appeals.

The Court of Appeals chose the latter; i.e., if portability is destroyed by the manner of installation, the "building" is no longer a "trailer house." This would have the effect of allowing the owner of the smallest highway travel trailer containing a kitchen to avoid the proscription of the ordinance by simply affixing the trailer to his RR land in such manner as permanently to destroy its portability. We cannot believe that the framers of the ordinance intended that absurdity.

We choose the former; i.e., we find it more logical that "designed" refers to design for the manufacture of the building. It is true that this probably means that, as it leaves the manufacturer, a "building" which is a mobile home is forever a mobile home.[7] If the authors of the ordinance intended otherwise, it would have been easy so to say. We hold, therefore that a building is a trailer house within the meaning of this ordinance if the building is designed to be manufactured in such a manner that it may be moved from one location to another. Such a structure, being expressly excluded from the definition of a single-family dwelling, is not an outright permitted use in the RR zone.[8]

[7] The majority below implies that such a construction of the ordinance would necessarily include within its ambit all component parts of conventionally constructed homes. That ignores the word "building" in the definition of "trailer house." A truckload of lumber or bricks cannot meet the definition of "building" contained in the ordinance.

[8] It can be logically argued that even if "designed" refers to installation, by defendants' own proof, their mobile home was portable. Its installation, in defendants' own words, consisted of the following:

"The unit was slid into place and bolted together and anchored down."

Presumably, it could be moved from its present location to another by reversing the above process; i.e., removing the anchors, unbolting the units and sliding them out to be moved to another location. On the portability continuum, with a highway travel trailer on one end and a conventionally constructed house on the other, it is clearly closer to the portability end of the continuum.

The Court of Appeals decision is reversed, and the trial court decree reinstated.[9]

[9] As indicated previously, defendants cited four assignments of error before the Court of Appeals. The Court of Appeals reversal obviated consideration of these assignments. We have considered each of them carefully and have concluded that none requires either a reversal of the trial court decree or extensive discussion here.

Defendants claim that the Ordinance should not be enforced against them as it is inconsistent with the mandates of state law, ORS 215.055(1), *see* n. 5, *supra*, requiring it to "promote the public health, safety and general welfare," such welfare including the encouragement of low cost housing. However, the same statute also requires consideration of "property values" and "the public need for healthful, safe, *aesthetic* surroundings and conditions." The choice of how to balance these potentially conflicting considerations is a legislative one and cannot prevent enforcement of the Ordinance in this particular case.

Defendants also claim that the enforcement of the Ordinance against them is inconsistent with the Clackamas County Comprehensive Plan, which states as a general policy that "[m]obile and modular homes should be encouraged *where appropriate*, as a means of fulfilling limited income housing needs." (emphasis added) The italicized language again indicates legislative discretion about where the encouragement of mobile homes is or is not appropriate. It is not for the courts to disturb the exercise of this legislative judgment in a case such as this one.

Defendants claim plaintiff was guilty of "unclean hands." This appears to be merely a repeat of the argument discussed above.

Defendants claim the Ordinance is inapplicable to defendants' structure, since such a structure (double wide mobile home) was unknown at the time the Ordinance was drafted in 1960. The fact that defendants' structure was wider and longer than those which existed in 1960 does not mean that it does not fall within the definition set out at the earlier date. As demonstrated in the text of this opinion, it does fall within the cited definition. The result of defendants' argument would be to leave such structures totally unregulated, a result so unreasonable as to compel its rejection.

Finally, defendants claim that the enforcement of the Ordinance against them constitutes an impermissible classification of mobile homes as distinct from conventionally constructed homes, thus denying them the equal protection of the laws. That classification, as such, however, is not subject to the protection of the equal protection clauses of the Oregon (Art I § 20) or the United States (14th Amendment) Constitutions, since it involves the classification of things, not persons. Defendants, however, claim that the underlying classification is one based on wealth, since mobile homes provide housing primarily for low-income persons. Even assuming the efficacy of the latter classification, it passes the equal protection tests both under the Oregon Constitution, *Olsen v. State ex rel Johnson*, 276 Or 9, 20, 554 P2d 139 (1976), and under the United States Constitution, *San Antonio School District v. Rodriguez*, 411 US 1, 40-44, *reh den* 411 US 959 (1973).

HOWELL, J., dissenting.

I dissent. The majority opinion misconstrues a Clackamas County ordinance, giving it a meaning that potentially violates the Clackamas County Comprehensive Plan and the goals of the state's Land Conservation and Development Commission.

The issue before this court is whether defendants William and Mary Dunham violated a Clackamas County zoning ordinance when they put their new 1,500 square foot mobile home on their property. The ordinance provides, in part, as follows:

"Permitted Uses:

"In a Recreational Residential District, the following uses are allowed as hereinafter provided:

"A. Principal Uses

"1. One single-family dwelling unit per lot or parcel of land." (§ 22.3)

"Single-family dwelling" is defined in the ordinance as:

"A detached building containing one kitchen, designed for and occupied exclusively by one family and the household employees of that family, but not a trailer house." (§ 3.2)

"Trailer house" is defined as:

"* * * a building designed in such a manner that it may be moved from one location to another." (§ 3.2)

Thus, the specific issue is whether modern mobile homes are "trailer houses" within the meaning of the Clackamas County ordinance.[1] Stated another way, are modern mobile homes designed in such a manner that they may be moved from one location to another?

It is conceded that a mobile home is built to be moved from the place of manufacture to its initial homesite. But I do not believe that the ordinance was

[1]The decision of the majority that the mobile home in this case constitutes a proscribed trailer house under the 1960 Clackamas County ordinance should have no bearing on some other municipal ordinance relating to mobile homes, trailer houses, or modular homes.

intended to cover that initial movement. The words "designed in such a manner that it may be moved from one location to another" connotes a design that foresees continual movement. In other words, the ordinance proscribes buildings that are designed to be moved on the lot and off again.

Generally, modern mobile homes are designed to be moved once—from the dealer to the homesite. If the manufacturer's initial design is controlling, then the size of this mobile home, over 1,500 square feet of usable floor space, and the cost and difficulty of moving it is evidence that the manufacturer's design was that it not be moved after it was initially placed. If, on the other hand, we must look to the installer's design, then the mobile home's attachment to a foundation, the detachment of the wheels, axles and tongue, and the addition of a driveway, skirt and patio all point to a design on the part of the purchaser to fix the mobile home to that piece of property so that it would not be moved again. Surely, if the installer had any intent to move the mobile home again, he would not have removed the wheels, axles, springs and tongue with a cutting torch and placed the home on a foundation.

In addition to the language of the ordinance itself, the history of trailer houses and mobile homes argues for a different result in this case. The ordinance was passed in 1960, a time when the state of the art in the mobile home industry was such that the phrase "trailer houses" had a meaning unrelated to the reality of modern mobile homes.

"The early house trailers were not mobile homes, and not regarded or intended by their occupants as permanent dwellings. They were small recreational vehicles, usually 10 or 12 feet long, simple in design and manufacture, light, easily transportable, practical, useful, and economical." Hodes and Roberson, *The Law of Mobile Homes* 1, Ch. 1.1 (3d ed 1974).

One major reason for excluding trailer houses from residential areas was the transient nature of trailer dwellers:

"The development of mobile homes as a generally acceptable form of housing has come about so recently that the stereotyped picture of the 'trailer dweller' still raises the hackles of many tradition bound community planners." Shepard's *Mobile Homes and Mobile Home Parks* 3 (1975).

When the ordinance was enacted, trailer houses were vehicles whose mobility was determined by one's desire to go. Today, mobile homes are an alternative type of economical housing. The "mobility" of modern mobile homes is more myth than reality.

"The mobile home dweller is not inclined to move his home unless required to do so. * * * Most of the occupants of mobile homes prefer to remain for long periods in a park or neighborhood which they have grown to like. * * *

"Mobility, in fact, has become important only in moving the home from factory to dealer's sales center, and from there to homesite. A 20-foot-wide mobile home comprising two sections requires two licenses for highway movement, but only one for mobile home park registration." Hodes and Roberson, *supra* at 8. (Footnote omitted.)

Thus, given the language of the ordinance and the history of the development of mobile homes, it seems clear that the ordinance was designed to exclude structures that may be moved on and off the land like trailer houses. This mobile home does not fit that definition.

I cannot believe that a structure 68' x 24' with 1,500 square feet of living space containing a kitchen, living room, dining area, family room, utility room, three bedrooms and two bathrooms placed on a concrete foundation constitutes a trailer house within the meaning of the 1960 Clackamas County ordinance.[2]

I would affirm the Court of Appeals.

[2] I also conclude that my interpretation of the 1960 ordinance is consistent with the Clackamas County Comprehensive Plan and with the goals and guidelines of the state Land Conservation and Development Commission.

LINDE, J., dissenting.

I join in Justice Howell's dissenting opinion that the structure in question here is not a "trailer house" within the meaning of the 1960 Clackamas County Ordinance. I only add a few sentences to stress the point made in the majority opinion as well as the dissent, that this decision states no general rule concerning mobile or modular homes but solely interprets that particular ordinance. Local governments may, within the limits of law, adopt and amend their ordinances to meet their objectives, and even the use of the same words does not necessarily carry the same interpretation in the ordinances of different cities or counties if there is reason to conclude that the words were meant in a different sense when they were adopted. Clackamas County in 1960 might have chosen to include structures such as the Dunhams' when they made "trailer houses" a conditional use, but for the reasons stated by Justice Howell, I do not believe it did so.

APPENDIX "A"

SUPREME COURT
STATE OF OREGON
COURT OF APPEALS

June 21, 1978

Mark P. O'Donnell
O'Donnell, Rhoades & Gerber
811 N.W. 19th Avenue
Portland, Oregon 97209

Scott H. Parker
County Counsel
Clackamas County Courthouse
Oregon City, Oregon 97045

Gentlemen:

In re: Clackamas County v. Dunham
SC 25644

The court has considered the respondents' petition for rehearing. Upon reflection, the court is of the opinion that footnote 3 of the majority opinion should be withdrawn. That footnote was based upon an assertion made in oral argument by counsel for plaintiff. The assertion was not challenged during oral argument. The court now believes that the language of the footnote may be more broad than was warranted by the statement during oral argument. On the other hand, the court and the author of the opinion find that the footnote actually played no part in the decision of the case, and since it may have been partially inaccurate, the

APPENDIX "A"

footnote is withdrawn.

The editors of the Oregon Reports and West Publishing Company will be so notified.

Very truly yours,

/s/ Loren D. Hicks
State Court Administrator

cc: Members of the Court
Editor, Oregon Reports
Editor, West Publishing Company

APPENDIX "A"

STATE OF OREGON

SUPREME COURT

CLACKAMAS COUNTY, a political subdivision of the State of Oregon,	)
Petitioner,	) JUDGMENT and MANDATE
v.	) Appeal from CLACKAMAS
WILLIAM T. DUNHAM and MARY LOU DUNHAM, husband and wife,	) County
	) No. 91323
Respondents.	) SC 25644 CA 6817

This cause having been duly submitted on Petition for Review from the Court of Appeals and this Court having considered the issues on review finds there is error as alleged.

IT IS THEREFORE ADJUDGED and ORDERED that the decision of the Court of Appeals is reversed and the decision of the trial court is affirmed and the cause is remanded through the Court of Appeals to the trial court for further proceedings in conformity with the opinion of this Court.

IT IS FURTHER ORDERED that petitioner recover from respondents costs and disbursements in this Court in the amount

APPENDIX "A"

of $90.00.

ENTERED in the Supreme Court: May 23, 1978.

ENTERED in the Court of Appeals: August 17, 1977.

Mandate Issued: June 27, 1978

APPENDIX "A"

SUPREME COURT
STATE OF OREGON
COURT OF APPEALS

July 12, 1978

Mr. Mark P. O'Donnell
O'Donnell, Rhoades & Gerber
Attorneys at Law
811 N.W. 19th Avenue
Portland, Oregon 97209

Re: Clackamas County v. Dunham
CA #6817

Dear Mr. O'Donnell:

The Supreme Court has today allowed the appellants' motion for a stay of the execution and enforcement of the Oregon Supreme Court mandate in the above-entitled matter, pending a decision of the United States Supreme Court on the appeal to that court that you state will be filed there on or before September 19, 1978. If such appeal is not filed by that date, then this stay will be dissolved.

This letter constitutes the order of the court on this matter.

Very truly yours,

/s/ David Gernant
Legal Counsel

DG:dj
cc: Mr. Scott H. Parker

APPENDIX "B"

INDEX

APPENDIX "B"

ORDINANCES

7.41 General Provisions

A.....Parking of a trailer in any Residential District or a Local and/or Community Commercial District shall be permitted, provided that no living quarters shall be maintained or any business conducted in connection therewith while such trailer is parked or stored, and provided the trailer conforms to the front and side yard setbacks.

B.....No trailer shall be used for living purposes except when located in a trailer park possessing a Certificate of Sanitation issued pursuant to ORS 446.066 to 446.046. A trailer may be used as temporary living quarters when not located in a trailer park and when issued a temporary permit by the Board of Adjustment.

C.....In any district, the wheels or any similar transporting devices of any trailer or camp car shall not be removed except for repairs; nor shall such trailer or camp car be otherwise

APPENDIX "B"

permanently fixed to the ground by any person, firm or corporation in a manner that would prevent ready removal of said trailer or mobile home.

22.3 Permitted Uses:

In a Recreational Residential District, the following uses are allowed as hereinafter provided:

A. Principal Uses

1. One single family dwelling unit per lot or parcel of land.

2. Planned Unit Developments with a density of one (1) dwelling unit or less per acre as provided in Section 22.4, and which include attached or detached residential dwelling units but not commercial facilities or condominiums.

3. Any accessory use, building or other facility customarily a part of the above permitted uses that is clearly incidental and secondary to the permitted use and which does not change the character of the permitted use or

adversely affect other properties in the vicinity.

B. Conditional Uses

1. The following uses may be allowed as a conditional use subject to Section 8 and Section 12.4, Procedure for Public Hearing, of this ordinance:

   a. Churches, with a minimum site area requirement of two (2) acres;

   b. Homes for the aged and nursing homes, with a minimum site area requirement of two (2) acres;

   c. Mobile home parks, with an allowable maximum density of four (4) mobile homes per acre;

   d. Quarry activities or uses: rock, gravel, sand, soil, aggregates and similar type extractive activities and use, but none within any streamside control area (as defined in Section 3.2) or one hundred (100) feet of the

average annual high water mark of any stream, river or other body of water, whichever is greater;

   e. Schools, public or private, with a minimum site area requirement of ten (10) acres;

   f. Child care facilities with a minimum site area requirement of one (1) acre;

   g. Service recreational facilities;

   h. Sanitary land fills and solid waste transfer stations, with a minimum site area requirement of three (3) acres;

   i. Heliports for emergency use only (fire, rescue, etc.)

APPENDIX "B"

OREGON REVISED STATUTES

215.180 Unlawful construction or use a nuisance. The location, erection, construction maintenance, repair, alteration or use of a building or other structure, or the subdivision, other partitioning, or use of land, in violation of an ordinance or regulation authorized by ORS 215.010 to 215.190 and 215.402 to 215.422 shall be deemed a nuisance.

215.185 Remedies for unlawful structures or land use. In case a building or other structure is, or is proposed to be, located, constructed, maintained, repaired, altered, or used, or any land is, or is proposed to be, used, in violation of an ordinance or regulation authorized by ORS 215.010 to 215.190 and 215.402 to 215.422, the governing body or district attorney of the county or a person whose interest in real property in the county is or may be affected by the violation, may, in addition to other remedies provided by law, institute injunction, mandamus, abatement, or other appropriate proceedings to prevent, temporarily or permanently enjoin, abate or remove the unlawful location, construction, maintenance, repair, alteration or use. When a temporary restraining order is granted in a suit instituted by a person who is not exempt from furnishing bonds or undertakings under ORS 22.010, the

APPENDIX "B"

person shall furnish undertaking as provided in ORS 32.010 to 32.060. (Amended 1977, Oregon Laws, Chapter 766, § 6)

APPENDIX "C"

Mobile home 'illegal'

Family to fight eviction

By JOYCE ROUTSON
Journal Staff Writer

BRIGHTWOOD — Mary Lou Dunham says putting a mobile home on eight acres in Brightwood "was the only way we could better our future." But today that future is cloudy as the Dunham family faces eviction because the mobile home violates Clackamas County zoning ordinances.

May 23 the Oregon Supreme Court reversed a Court of Appeals decision that would have allowed mobile homes — with wheels, axles and other equipment removed — in Clackamas County single family residential zones.

Forced to reassess their situation in the wake of the seesaw, five-year battle to keep the mobile home, the Dunhams say they will fight the Supreme Court decision.

"It's unconstitutional not to be able to put a mobile home on our property," says Mrs. Dunham. "It's our right to live the way we've chosen to — we're not hurting anyone else."

The Dunham's attorney, Mark O'Donnell of Portland, says he plans to file for a review before the Supreme Court. If that doesn't work, Mrs. Dunham says she and her husband William plan to take the matter to the U.S. Supreme Court if necessary.

Meanwhile Clackamas County officials say the Dunham mobile home, located on Truman Road, must be moved unless the couple gets a temporary permit or zone change. County Counsel Scott Parker says he will wait until the review filing deadline — 20 days after the decision — before enforcing the ordinance. Mrs. Dunham says there are no plans to file for the one-year temporary permit.

The Dunham's home violates the recreational residential zone they live in because trailer houses are not allowed without a conditional use permit.

"We tried to get a permit but we didn't find anyone who would give us one," says Mrs. Dunham. The officials waited a year after the 1,500 square foot home was installed before taking the couple to Circuit Court in 1973.

To this day Mrs. Dunham says she doesn't know why the couple was singled out. "It's very discriminatory. There are mobile homes all over here," she says. She adds before placing the home on the property, she and her husband asked if the neighbors objected and received no negative responses.

Mrs. Dunham says the 24-foot by 68-foot double wide mobile home was necessary as the couple couldn't afford anything else.

"We had a chance to buy this property and there wasn't any money left for a house," she says. Besides, she adds, the couple has lived in mobile homes most of their married life and enjoy them.

She says they had planned to improve the $14,000 mobile home by adding a patio, a storeroom and garage. But those plans had to be scrapped when the legal battles began. There are evidences of landscaping around the home, and there is a circular, graveled driveway.

"I just don't know what we'd do if we had to move it," she says. "It would be the same as moving a house — there are no axles or tongues left. And I don't know where we'd move it — there are no mobile home spaces available here or in Clackamas County."

According to H.J. Byer, executive director of the Oregon Mobilehome Park Association, "The vacancy factor is virtually zero in the whole metropolitan area."

Mrs. Dunham does not project the image of a transient, undesirable person. She and her husband, an electrical contractor, are active members of the Hoodland community, having organizaed a youth baseball program. Dunham is a member of the Welches School Board and the local Lions Club and Mrs. Dunham a member of the Hoodland Women's Club. They have three children, the youngest of which still lives at home.

Mrs. Dunham thinks most people have the wrong ideas about mobile homes. "Most people not familiar with them think of trailer houses of years ago — the crackerboxes. Ours is made to state specification; in fact it passes all specifications except Clackamas County. It's good enough for the FHA and the Veterans' Administration but not good enough for Clackamas County," she says wryly.

As she faces an uphill legal battle that has already cost almost $5,000, Mrs. Dunham has a warning for the officials who want to block their mode of living. "I think there should be rules and regulations for mobile homes the same as for stick built homes. The county has to realize they must accept mobile homes because people just can't afford the prices of conventional homes.

"But it's hard though for one person to do it," she says.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-446

WILLIAM T. DUNHAM and
MARY LOU DUNHAM,
husband and wife,

Appellants,

v.

CLACKAMAS COUNTY, a
political subdivision
of the State of Oregon,

Appellee.

On Appeal from the
SUPREME COURT OF THE STATE OF OREGON

MOTION TO DISMISS

KEITH KINSMAN
Assistant County Counsel
CLACKAMAS COUNTY COUNSEL
906 Main Street
Oregon City, OR 97045
Attorney for Appellee

In The

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MOTION TO DISMISS

The Appellee moves the Court for an order dismissing the appeal herein on the ground that it is manifest that the decision of the Oregon Supreme Court is correct and that no substantial federal question is presented on this appeal.

I.

STATEMENT

On May 17, 1960, the Clackamas County Board of County Commissioners enacted the original Clackamas County Zoning Ordinance (hereafter "the Ordinance"). On December 14, 1967, the County made the Ordinance applicable to the property now owned by appellants, zoning it within a Recreational Residential District. Mobile homes were allowed in a Recreational Residential District in mobile home parks as conditional uses. Individual mobile homes were not permitted. In 1972 the Appellants purchased the property in question, then bought and installed a mobile home on the property. On April 4, 1975, the County brought a nuisance abatement action against the Appellants pursuant to ORS 215.185, a state statute which provides that structures being maintained or used in violation of county zoning ordinances may be abated as nuisances. The trial court found for the County and enjoined the Appellants from maintaining the mobile home as a residence on their property.

On appeal, a majority of a three member panel of the Oregon Court of Appeals reversed the trial court decision, on the basis that the County had not proved that the Appellants' mobile home was a "trailer house" as that term was defined in the original Ordinance. On review, the Oregon Supreme Court reversed the Court of Appeals, holding that the Appellants' mobile home was a "trailer house" under the Ordinance. In a footnote, the Court stated that the equal protection clause did not apply to classification of things rather than persons, and that even if the clause did apply, the classification in this case was sufficiently rational to avoid violating the equal protection guarantee.

The only question properly before the Court on this appeal is whether the original Ordinance provisions regulating mobile homes, in particular Sections 3.2 and 22.3 of the Ordinance, violated the equal protection clause of the Fourteenth Amendment. It is difficult to imagine how Section 3.2 involves an equal protection question, since it simply is a definition of "trailer house". The major issue in the Oregon appellate courts was whether this definition included the Appellants' mobile home, an issue finally decided against the Appellants; but this was purely a matter of statutory construction, having nothing to do with equal protection, and is not appropriate for decision by the Court on this appeal. The crux of Appellants' equal protection argument appears to be that Section 22.3 of the original Ordinance, which restricts mobile homes to mobile home parks in the Recreational Residential District, makes an impermissible classification in violation of the equal protection clause. Appellee asserts that this argument is clearly without merit and presents no substantial federal question.

II.

ARGUMENT

1. <u>"Strict Scrutiny" is not the proper test in this case</u>.

The Appellants contend that the Ordinance should be subjected to "strict scrutiny" by this Court. This position is clearly incorrect. Numerous decisions of this Court have firmly established that strict scrutiny will only be brought into the equal protection analysis when the legislation being challenged either discriminates against a "suspect class" or impinges on a "fundamental right". The Ordinance in question here does neither.

The Appellants apparently seek to hang their strict scrutiny claim on the "fundamental rights" hook, claiming that this Ordinance "affects the exercise of appellants' fundamental right to acquire, enjoy, own and dispose of property." Appellants' Jurisdictional Statement, p. 18. The fatal flaw in this argument is that the right to unrestricted use of one's property is not the type of interest that has been held to be "fundamental" for equal protection purposes. This is for good reason. If the Appellants' approach was adopted, this Court would in effect be agreeing to subject to strict scrutiny any sort of restriction on the use of any particular classification of property. As this Court has recently noted, "By its nature, zoning 'interferes' significantly with owners' uses of property." City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 675, n. 8 (1976). In addition to "interfering", zoning laws also by their very nature classify property. Therefore, under Appellants' theory, virtually all zoning laws would be subject to strict scrutiny. So too would a large number of other police powers of state and local authorities which involve classification and to one degree or another regulate the "right to acquire, enjoy, own and dispose of property".

Although not clearly expressed, Appellants' lengthy dissertation on the housing market seems to imply that the Ordinance also impinged on the public's rights to own their own homes and to have adequate housing. This argument adds no weight to Appellants' pleas for strict scrutiny, since this Court has established that the need or desire for a particular type or standard of housing is not a "fundamental right" for equal protection purposes. Lindsey v. Normet, 406 U.S. 56 (1972).

The Appellants, therefore, have not and cannot establish any recognized "fundamental right" being impinged upon by this Ordinance. Neither was there

any "suspect class" being discriminated against by this Ordinance.

The Appellants talk at great length about housing shortages and costs, and there is perhaps the suggestion that the Ordinance discriminates against poor people or against "that forgotten segment of American society known as the 'Middle Class'." Appellants' Jurisdictional Statement, p. 4. Even if one were to accept this theory, it has been established at least since San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), and James v. Valtierra, 402 U.S. 137 (1971), that lack of wealth does not make one a member of a "suspect class". (See also Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 [9th Cir., 1974], specifically discussing this point in the context of zoning that allegedly excluded low-cost housing.) Even if the Appellants were able to somehow delineate the composition of the class in this case, there is no way that such class would be "suspect" for equal protection purposes. The only other possible class here is the class of mobile home owners, even more obviously not a "suspect class" requiring the protection of strict scrutiny.

In sum, since the Ordinance singles out no "suspect class" and adversely affects no "fundamental right", it need not be subject to strict scrutiny.

2. The Ordinance's classification and treatment of mobile homes is Rational.

Since strict scrutiny is not involved here, this Court should only rule the Ordinance unconstitutional if it is "clearly arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals or general welfare." Village of Euclid, Ohio v. Ambler Realty Company, 272 U.S. 365, 386 (1926). Put another way, the

the determination to be made is ". . .whether there is some ground of difference that rationally explains the different treatment. . ." accorded to trailer houses. Eisenstadt v. Baird, 405 U.S. 438, 448 (1972). The Appellee asserts that it is well within the legitimate police power of local government to distinguish between mobile homes and other types of residences, and that the specific restrictions put on the placement of mobile homes by the original Ordinance were reasonable and rational.

The general proposition that local governments have the authority under the police power to differentiate mobile homes from conventional housing and regulate their placement and use is so well established as to be beyond dispute. See, for example, 7 E. McQuillin, Municipal Corporations, § 24.564 (3rd Ed., 1968 rev. vol.); 101 C.J.S., Zoning, § 61 (1958); 2 R. Anderson, Law of Zoning, § 14.05 (2nd Ed., 1976), and cases cited therein. The Appellants apparently are arguing that the only reason for regulating the placement of mobile homes is aesthetics, that this is an insufficient reason, and that therefore an ordinance embodying such restrictions must be held invalid.

Aesthetics is one valid consideration in land use decisionmaking, as recognized by this Court in Berman v. Parker, 348 U.S. 26 (1954). A number of state courts have, in fact, held that aesthetics alone may be ample justification for land planning decisions, including the Oregon Supreme Court in Oregon City v. Hartke, 240 Or. 35 (1965). But, the Appellants are incorrect in their conclusion that aesthetics is the only reason for singling out mobile homes. The courts have recognized numerous other factors that distinguish mobile homes from conventional housing. A few of these factors (with examples of decisions recognizing them) include:

1. Mobile homes often pose unique problems in the provision of municipal services such as water and sewage, with attendant health problems. State v. Larson, 292 Minn. 350, 195 N.W.2d 180 (1972);

2. Mobile homes have historically depreciated in value, while conventional homes, relatively, have appreciated. Clackamas County v. Ague, 27 Or. App. 515, 556 P.2d 1386 (1976);

3. Mobile homes may be detrimental to property values in neighborhoods where they are situated. Town of Manchester v. Phillips, 343 Mass. 591, 180 N.E.2d 333 (1962);

4. The lesser value of mobile homes, as compared with other possible developments on the land, results in comparatively less tax revenues. Vickers v. Township Committee Gloucester Township, 37 N.J. 232, 181 A.2d 129 (1962), appeal dismissed, 371 U.S. 233 (1963);

5. The presence of mobile homes may result in a more transient population within a neighborhood where they are situated. Town of Yorkville v. Fonk, 3 Wis.2d 371, 88 N.W.2d 319 (1958);

6. Mobile homes may hinder the orderly and beneficial development of particular localities. Napierkowski v. Gloucester Township, 29 N.J. 241, 150 A.2d 481 (1959).

The presence of factors such as these has led to the overwhelming consensus of the courts that mobile homes do indeed differ from conventional housing and that in the promotion of the general welfare they may be treated accordingly.

Assuming that mobile homes may properly be singled out for special treatment, the question is whether the specific treatment accorded this class of residence by the original Ordinance was

reasonable. The basic restriction on mobile homes in the Recreational Residential District is that they are only allowed in mobile home parks. This scheme obviously reflects a legislative judgment that the problems inherent in mobile homes are best dealt with by grouping mobile homes together in appropriate areas. At the time the suit in this case was initiated, mobile homes were also allowed in mobile home parks in a large number of other zoning districts as conditional uses, and individual mobile homes were permitted outright in another type of district. (A 1976 amendment to the Ordinance allows individual mobile homes in a number of residential districts, but in Recreational Residential Districts they are still restricted to mobile home parks. The bulk of Recreational Residential District land is in scenic areas located around Mt. Hood and the corridor between Portland and Mt. Hood.)

This type of legislation, restricting mobile homes primarily to mobile home parks, is certainly not arbitrary or unreasonable. Almost all courts that have considered the question have held that it is permissible for local authorities to restrict mobile homes to mobile home parks. A few of the many cases so holding are State v. Larson, supra; Wright v. Michaud, 160 Me. 164, 200 A.2d 543 (1964); Napierkowski v. Gloucester Township, supra; Town of Manchester v. Phillips, supra; City of Colby v. Hurtt, 212 Kan. 113, 509 P.2d 1142 (1973); People v. Clute, 18 N.Y.2d 999, 278 N.Y.S. 2d 231, 224 N.E.2d 734 (1965); Matherville v. Brown, 34 Ill. App. 3d 298, 339 N.E.2d 346 (1975).

In conclusion, the vast weight of legal authority holds that it is reasonable, in promotion of the general welfare, to single out mobile homes in zoning legislation and that it is reasonable to restrict mobile homes to mobile home parks. The Appellants counter with policy arguments that it would be better to loosen zoning restrictions to

allow more mobile homes and allow them on individual lots. But the question before this Court is the constitutionality of the original Clackamas County Zoning Ordinance, not its wisdom. A recent decision of this Court, Warth v. Seldin, 422 U.S. 490 (1975), although dealing primarily with a standing question, aptly states the fundamental weakness of this appeal:

> We also note that zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authority. They are, of course, subject to judicial review in a proper case. But citizens dissatisfied with provisions of such laws need not overlook the availability of the normal democratic process. 422 U.S. at 509, n. 18.

Appellants' arguments properly belong before the state or local legislative bodies, not before this Court.

III.

CONCLUSION

For the foregoing reasons, there is no substantial federal question before the Court, and this appeal should be dismissed.

Respectfully submitted,

/s/ Keith Kinsman

Keith Kinsman
Counsel for Appellee

Clackamas County Counsel
906 Main Street
Oregon City, OR 97045
(503) 655-8362